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THE
C H A R G E

OF

J U D G E P A T E R S O N

To THE JURY,

IN THE CASE OF VANHORNE'S *LESSEE* AGAINST DORRANCE:

Tried at a Circuit Court for the United States, held at Philadelphia, April Term 1795:

WHEREIN THE CONTROVERTED TITLE TO THE *WYOMING*
LANDS, BETWEEN THE CLAIMANTS UNDER PENNSYLVANIA
AND CONNECTICUT, RECEIVED A DECISION.

P H I L A D E L P H I A :

PRINTED BY SAMUEL H. SMITH, NO. 118 CHESNUT-STREET.

1796.

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Gentlemen of the Jury,

HAVING arrived at the last stage of this long and interesting cause, it now becomes the duty of the court to sum up the evidence, and to declare the law arising upon it. A mass of testimony has been brought forward in the course of the trial, the far greater part of which is altogether immaterial, and can be of no use in forming a decision. The great points, on which the cause turns, are of a legal nature ; they are questions of law ; and therefore for the sake of the parties, as well as for my own sake, they ought to be put in a train for ultimate adjudication by the supreme court. In the administration of justice it is a consoling idea, that no opinion of a single judge can be final and decisive ; but that the same may be removed before the highest tribunal for revision, where, if erroneous, it will be rectified. For the sake of clearness, I shall consider,

I. *The title of the plaintiff.*

II. *The title of the defendant.*

I. *The title of the plaintiff.*

In deducing title, the plaintiff exhibited,

1. The charter or grant from Ch. 2. to William Penn. The lands in question lie within the limits of this charter.

2. Deed from the Six Nations to Thomas and Richard Penn. To this deed a map is annexed and made part of it, by which the land conveyed is accurately delineated or laid down. This mode of procedure is eminently just and laudable; it furnishes a precedent, which, as far as possible, ought to be observed in every transfer of land made by the Indians, as it obviously tends to quiet the spirit of jealousy, to remove suspicion, and prevent imposition and fraud.

3. A warrant to survey for the proprietors certain tracts of land containing twenty thousand acres.

4. Survey of the above lands. The land in controversy lies within the Indian deed to the Penn's, and is covered by this survey.

5. Lease from Thomas and Richard Penn to Thomas Van Horne, for the term of seven years of lot No. 38, containing one hundred acres.

6. Instructions to lay out and sell the land.

7. Allotment to Thomas Van Horne of lot No. 20, containing 190 acres and 90 perches.

8. Warrant from Richard Penn, lieutenant governor, to make a separate return of lot No. 20, to Thomas Van Horne. A separate return was made accor-

5th Nov.
1768.

29th Octob.
1768.

5th and 9th
Dec. 1768.

1st March
1769.

Feb. and
March,
1771.

15th Jan.
1772.

dingly, and marked on the general survey of March, 1771.

9. Patent from Thomas and John Penn to Thomas Van Horne for lot No. 20. The consideration money was paid agreeably to contract. 17th Jan. 1772.

10. Deed from Thomas Van Horne to Cornelius Van Horne, lessor of the plaintiff for lot No. 20. 15th Nov. 1774.

It is in evidence, that this lot was built upon, fenced, tilled, and improved by Van Horne. It is also in evidence, that, John Dorance, the defendant, is in possession of and resides upon the said lot.

Such is the title, upon which the plaintiff rests his cause. It is clearly deduced and legally correct; and therefore, unless sufficient appears on the part of the defendant, will entitle the plaintiff to your verdict. To repel the plaintiff's right and to establish his own, the defendant sets up a title.

I. *Under Connecticut.*

II. *Under the Indians.*

III. *Under Pennsylvania.*

I. *Under Connecticut.*

The title under Connecticut is of no avail. Because the land in controversy is ex-territorial; it does not lie within the charter-bounds of Connecticut, but within the charter-bounds of Pennsylvania. The charter of Connecticut does not cover or spread over the lands in question. Of course no title can be derived from Connecticut. Here then the defendant fails.

II. *Under the Indians.*

The Indian deed, under which the defendant claims, bears date the 11th of July 1754. It has been observed, that this deed is radically defective and faulty; that fraud is apparent on the face of it, and, particularly, that the specification or description of the land is written on a rasure. Of this, gentlemen, you will judge, as the deed will be given to you for inspection. Permit me to observe, that there are several ways, by which a deed may be avoided or rendered of no effect. One of these is by rasure, addition, interlining, or other alteration in any material part, if done after its execution. It is the province of the jury to determine, whether any such alteration was made after the delivery of the deed.

Besides, this deed appears to have been executed at different times; and not in that open, public, national manner, in which the Indians sell and transfer their lands.

But if the deed was fairly obtained; if it has legal existence, then, what is its legal operation.

By the charter to William Penn, the right of pre-emption attached, and was vested in him to all the lands comprehended within its limits. The Penn family had exclusively the right of purchasing the lands of the Indians; and, indeed, the Indians entered into a stipulation of that kind.

Again, this deed is invalid by the laws of Pennsylvania. The legislature of Pennsylvania, by an act passed the 7th Feb. 1705, declare, "That if any person presume to buy any land of the natives, within

“ the limits of this province and territories, without
 “ leave from the proprietary thereof, every such
 “ bargain or purchase shall be void and of no effect.”

By an act passed the 14th Feb. 1729—30, it is further declared, “ That every gift, grant, bargain, ^{1 Pennsylv.}
 “ sale, written or verbal contract or agreement, and ^{Laws, 157,}
 “ every pretended conveyance, lease, demise, and ^{158.}
 “ every other assurance made, or that shall hereafter be
 “ made, with any of the Indian natives, for any lands,
 “ &c. within the limits of this province, without the
 “ order or direction of the proprietary or his com-
 “ missioners, shall be null, void, and of no effect.”

The land in controversy being within the limits of Pennsylvania, the Connecticut settlers were in legal estimation, trespassers and intruders. They purchased the land without leave, and entered upon it without right.

They purchased and entered upon the land without the consent of the legislature of Connecticut. True it is, that the legislature of Connecticut gave a subsequent approbation, but this was posterior to the deed executed by the Six Nations to Penn at fort Stanwix, and the principle of relation does not retrospect so as to affect third persons.

The consequence is, that the Connecticut settlers derive no title under the Indian deed.

III. The title which the defendant sets up *under Pennsylvania*. This is the keystone of the defendant's title, as one of his counsel very properly expressed it. It required no great sagacity to perceive, that the defendant's hope of success was founded on a law of

Pennsylvania, commonly called the quieting and confirming act. This act, and the two subsequent ones of a suspending and a repealing nature, open an extensive and important field for discussion. In general verdicts, it frequently becomes necessary for juries to decide upon the law as well as the facts. To form a correct judgment, legal principles must be taken up and applied, and when this is done in a proper manner, it gives stability to judicial decisions, and security to civil rights. Hence uniformity and certainty; hence the decisions of to-morrow will be like the decisions of to-day; they will run in the same line, because they are founded on the same principles. To aid you, Gentlemen, in forming a verdict, I shall consider,

I. The constitutionality of the confirming act, or, in other words, whether the legislature had authority to make that act.

Legislation is the exercise of sovereign authority. High and important powers are necessarily vested in the legislative body, whose acts, under some forms of government, are irresistible and subject to no control. In England, from whence most of our legal principles and legislative notions are derived, the authority of the parliament is transcendent and has no bounds.

r. Bl. Com.
160.

“ The power and jurisdiction of parliament, says
 “ Sir Edward Coke, is so transcendent and absolute,
 “ that it cannot be confined, either for causes or persons,
 “ within any bounds. And of this high court, he adds,
 “ it may be truly said, *Si antiquitatem spectes, est vetus-*
 “ *tissima; si dignitatem, est honoratissima; si jurisdic-*

tionem, est capacissima. It has fovereign and un-
 controlable authority in the making, confirming,
 enlarging, restraining, abrogating, repealing, re-
 viving, and expounding of laws, concerning matters
 of all possible denominations, ecclesiastical or tem-
 poral, civil, military, maritime, or criminal: this
 being the place where that absolute despotic power,
 which must in all governments reside somewhere, is
 entrusted by the constitution of these kingdoms. All
 mischiefs and grievances, operations and remedies,
 that transcend the ordinary course of the laws, are
 within the reach of this extraordinary tribunal. It
 can regulate or new model the succession to the
 crown; as was done in the reign of Henry VIII.
 and William III. It can alter the established re-
 ligion of the land; as was done in a variety of in-
 stances, in the reigns of king Henry VIII. and his
 three children. It can change and create afresh
 even the constitution of the kingdom and of
 parliaments themselves; as was done by the act of
 union, and the several statutes for triennial and
 septennial elections. It can, in short, do every
 thing that is not naturally impossible; and there-
 fore some have not scrupled to call its power, by a
 figure rather too bold, the omnipotence of parlia-
 ment. True it is, that what the parliament doth,
 no authority upon earth can undo."

From this passage it is evident, that, in England,
 the authority of the parliament runs without limits,
 and rises above control. It is difficult to say what the
 constitution of England is, because not being reduced
 to written certainty and precision, it lies entirely at

the mercy of the parliament. It bends to every governmental exigency ; it varies and is blown about by every breeze of legislative humour or political caprice. Some of the judges in England have had the boldness to assert, that an act of parliament made against natural equity is void ; but this opinion contravenes the general position, that the validity of an act of parliament cannot be drawn into question by the judicial department. It cannot be disputed, and must be obeyed. The power of parliament is absolute and transcendent ; it is omnipotent in the scale of political existence. Besides, in England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different. Every state in the union has its constitution reduced to written exactitude and precision.

What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles or fundamental laws are established. The constitution is certain and fixed ; it contains the permanent will of the people, and is the supreme law of the land ; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution—they owe their existence to the constitution—they derive their powers from the constitution—it is their commission ; and therefore all their acts must be conformable to it, or else they will be void—The constitution is the work or will of the

people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit, within which it must move. In short, gentlemen, the constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the legislature repugnant to the constitution is absolutely void.

In the second article of the declaration of rights, which was made part of the late constitution of Pennsylvania, it is declared, “ That all men have a natural
 “ and unalienable right to worship Almighty God ac-
 “ cording to the dictates of their own consciences
 “ and understanding: and that no man ought, or of
 “ right can be compelled to attend any religious wor-
 “ ship, or erect or support any place of worship, or,
 “ maintain any ministry, contrary to, or against, his
 “ own free will and consent: nor can any man, who
 “ acknowledges the being of a God, be justly deprived
 “ or abridged of any civil right as a citizen, on account
 “ of his religious sentiments, or peculiar mode of reli-
 “ gious worship; and that no authority can or ought
 “ to be vested in, or assumed by any power whatever,
 “ that shall in any case interfere with, or in any man-
 “ ner control, the right of conscience in the free exer-
 “ cise of religious worship.”

Declaration
of rights,
Article 2.

Constitution
of Pennsylv.
sect. 32.

In the thirty second section of the same constitution it is ordained, "That all elections, whether by the
" people or in general assembly shall be by ballot, free
" and voluntary."

Could the legislature have annulled these articles respecting religion, the rights of conscience, and elections by ballot? Surely no. As to these points there was no devolution of power---the authority was purposely withheld, and reserved by the people to themselves. If the legislature had passed an act declaring, that, in future, there should be no trial by jury, would it have been obligatory? No---it would have been void for want of jurisdiction, or constitutional extent of power. The right of trial by jury is a fundamental law, made sacred by the constitution, and cannot be legislated away. The constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immoveable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. I take it to be a clear position, that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. It

is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of the government.

Having made these preliminary observations, we shall proceed to contemplate the quieting and confirming act, and to bring its validity to the test of the constitution.

In the course of argument, the counsel on both sides relied upon certain parts of the late bill of rights and constitution of Pennsylvania, which I shall now read, and then refer to them occasionally in the sequel of the charge.

“ That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”

Declaration
of rights,
article 1.

“ That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service, when necessary, or an equivalent thereto: but no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives; nor can any man, who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent: nor are the people bound by any laws, but such as they

Same, art. 8.

“ have in like manner assented to for their common
 “ good.”

Declaration
 of rights,
 art. 11.

“ That in controversies respecting property, and in
 “ suits between man and man, the parties have a right
 “ to trial by jury, which ought to be held sacred.”

“ The members of the house of representatives shall
 “ be chosen annually by ballot, by the freemen of the
 “ commonwealth, and shall be stiled, The general as-
 “ sembly of representatives of the freemen of Penn-
 “ sylvania, and shall have power to chuse their speaker,
 “ the treasurer of the state, and their other officers ; sit
 “ on their own adjournments ; prepare bills and enact
 “ them into laws ; judge of the elections and qualifi-
 “ cations of their own members ; they may expel a
 “ member, but not a second time for the same cause ;
 “ they may administer oaths or affirmations on exami-
 “ nation of witnesses ; redress grievances ; impeach
 “ state criminals ; grant charters of incorporations,
 “ constitute towns, boroughs, cities, and counties : and
 “ shall have all other powers necessary for the legislature
 “ of a free state or commonwealth ; but they shall have
 “ no power to add to, alter, abolish, or infringe any
 “ part of this constitution.”

Constitution
 of Penn syl.
 sect. 9.

“ The declaration of rights is hereby declared to
 “ be a part of the constitution of this commonwealth
 “ and ought never to be violated on any pretence what-
 “ ever.”

Same, sect.
 46.

From these passages it is evident, that the right of
 acquiring and possessing property, and having it pro-
 tected, is one of the natural, inherent, and unaliena-
 ble rights of man. Men have a sense of property.
 Property is necessary to their subsistence, and corres-

pendent to their natural wants and desires ; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact, and by the late constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies ; but, no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompence in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind ; the parliament, with all their boasted omnipotence, never committed such an outrage on private property ; and if they had, it would have served only to display the dangerous nature of unlimited authority ; it would have been an exercise of power and not of right. Such an act would be a monster in legislation, and shock all mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice and moral rectitude ; it is incompatible with the comfort, peace, and happiness of mankind ; it is contrary to the principles of social alliance in every free government, and lastly it is contrary both to the letter and spirit of the constitution. In short, it is what every one would think unreasonable and unjust in his own case. The next step

in the line of progression is, whether the legislature had authority to make an act divesting one citizen of his freehold and vesting it in another, even with compensation. That the legislature, on certain emergencies, had authority to exercise this high power has been urged from the nature of the social compact, and from the words of the constitution, which says, that the House of Representatives shall have all other powers necessary for the legislature of a free state or commonwealth ; but they shall have no power to add to, alter, abolish, or infringe any part of this constitution. The course of reasoning on the part of the defendant may be comprised in a few words. The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government ; the existence of such power is necessary ; government could not subsist without it ; and if this be the case, it cannot be lodged any where with so much safety as with the legislature. The presumption is, that they will not call it into exercise except in urgent cases, or cases of the first necessity. There is force in this reasoning. It is, however, difficult to form a case, in which the necessity of a state can be of such a nature as to authorise or excuse the seizing of landed property, belonging to one citizen and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested ; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it. The constitution encircles, and renders it an holy thing. We must, gentlemen, bear constantly in mind, that the

present is a case of landed property, vested by law in one set of citizens, attempted to be divested, for the purpose of vesting the same property in another set of citizens. It cannot be assimilated to the case of personal property taken or used in time of war or famine, or other extreme necessity; it cannot be assimilated to the temporary possession of land itself on a pressing public emergency, or the spur of the occasion. In the latter case there is no change of property, no divestment of right, the title remains, and the proprietor, though out of possession for a while, is still proprietor and lord of the soil. The possession grew out of the occasion and ceases with it. Then the right of necessity is satisfied and at an end; it does not affect the title, is temporary in its nature, and cannot exist forever. The constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the constitution. It is sacred; for it is further declared, that the legislature shall have no power to add to, alter, abolish, or infringe any part of the constitution. The constitution is the origin and measure of legislative authority. It says to legislators, Thus far ye shall go and no further. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One incroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are gradually broken in upon, and the constitution eventually destroyed. Where the security, where the inviolability of property, if the legislature, by a private act, affect-

ing particular persons only, can take land from one citizen, who acquired it legally, and vest it in another? The rights of private property are regulated, protected, and governed by general, known, and established laws; and decided upon by general, known, and established tribunals; laws and tribunals not made and created on an instant exigency, on an urgent emergency, to serve a present turn, or the interest of a moment. Their operation and influence are equal and universal; they press alike on all. Hence security and safety, tranquillity and peace. One man is not afraid of another, and no man afraid of the legislature. It is infinitely wiser and safer to risk some possible mischiefs than to vest in the legislature so unnecessary, dangerous, and enormous a power as that which has been exercised on the present occasion; a power, that, according to the full extent of the argument, is boundless and omnipotent. For the legislature judged of the necessity of the case, and also of the nature and value of the equivalent.

Such a case of necessity, and judging too of the compensation, can never occur in any nation. Singular, indeed, and untoward must be the state of things, that would induce the legislature, supposing they had the power, to divest one individual of his landed estate merely for the purpose of vesting it in another, even upon full indemnification; unless that indemnification be ascertained in the manner which I shall mention hereafter.

But admitting, that the legislature can take the real estate of A. and give it to B. on making compensation, the principle and reasoning upon it go no further

than to shew, that the legislature are the sole and exclusive judges of the necessity of the case, in which this despotic power should be called into action. It cannot, on the principles of the social alliance, or of the constitution, be extended beyond the point of judging upon every existing case of necessity. The legislature declare and enact, that such are the public exigencies, or necessities of the state, as to authorise them to take the land of A. and give it to B.; the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract, and the constitution, direct, and they accordingly declare and ordain, that A. shall receive compensation for the land. But here the legislature must stop; they have run the full length of their authority, and can go no further: they cannot constitutionally determine upon the amount of the compensation, or value of the land. Public exigencies do not require, necessity does not demand, that the legislature should, of themselves, without the participation of the proprietor, or intervention of a jury, assess the value of the thing, or ascertain the amount of the compensation to be paid for it. This can constitutionally be effected only in three ways.

1. By the parties—that is, by stipulation between the legislature and proprietor of the land.
2. By commissioners mutually elected by the parties.
3. By the intervention of a jury.

The compensatory part of the act lies in the ninth section.

Act of Penn.
28th March,
1789.
sect. 9.

“ And whereas the late proprietaries, and divers
 “ other persons, have heretofore acquired titles to
 “ parcels of the lands aforesaid, agreeably to the laws
 “ and usages of Pennsylvania, and who will be deprived
 “ thereof by the operation of this act, and as justice
 “ requires, that compensation be made for the lands,
 “ of which they shall be thus divested ; and as the
 “ state is possessed of other lands, in which an equi-
 “ valent may be rendered to the claimants under
 “ Pennsylvania, and as it will be necessary, that
 “ their claims should be ascertained by a proper ex-
 “ amination. Be it therefore enacted, by the au-
 “ thority aforesaid, That all persons having such
 “ claims to lands, which will be affected by the ope-
 “ ration of this act, shall be, and they are hereby re-
 “ quired, by themselves, guardians, or other lawful
 “ agents, within twelve months, from the passing of
 “ this act, to present the same to the board of proper-
 “ ty, therein clearly describing those lands and sta-
 “ ting the grounds of their claims, and also adducing
 “ the proper proofs, not only of their titles, but of the
 “ situations, qualities, and values of the lands so claim-
 “ ed, to enable the board to judge of the validity of
 “ their claims, and of quantities of vacant lands pro-
 “ per to be granted as equivalents. And for every
 “ claim, which shall be admitted by said board as
 “ duly supported, the equivalent, by them allowed,
 “ may be taken either in the old or new purchase, at
 “ the option of the claimant ; and warrants and pa-
 “ tents, and all other acts of the public offices rela-
 “ ting thereto, shall be performed free of expence.
 “ The said board shall also allow such a quantity of

“ vacant land, to be added to such equivalent, as
 “ shall, in their judgment, be equal to the expences,
 “ which must necessarily be incurred in locating and
 “ surveying the same. And that the board of property
 “ may, in every case obtain satisfactory evidence of the
 “ quality and value of the land, which shall be claimed
 “ as aforesaid, under the proprietary title, they may
 “ require the commissioners aforesaid, during their sit-
 “ ting in the said county of Luzerne, to make the
 “ necessary enquiries, by the oaths or affirmations of
 “ lawful witnesses, to ascertain those points; and it
 “ shall be the duty of the said commissioners to en-
 “ quire and report accordingly.

In this section two things are worthy of considera-
 tion.

1. The mode or manner, in which compensation
 for the lands is to be ascertained.

2. The nature of the compensation itself.

The Pennsylvania claimants are directed to pre-
 sent their claims to the board of property—and what
 is the board to do thereupon? Why, it is,

1. To judge of the validity of their claims.

2. To ascertain, by the aid and through the me-
 dium of commissioners appointed by the legislature, the
 quality and value of the land.

3. To judge of the quantity of vacant land to be
 granted as an equivalent.

This is not the constitutional line of procedure.
 I have already observed, that there are but three
 modes, in which matters of this kind can be conduc-
 ted consistently with the principles and spirit of the
 constitution, and social alliance. The first of which

is by the parties, that is to say, by the legislature and proprietor of the land. Of this the British history presents an illustrious example in the case of the Isle of Man.

r. Bl. Com.
107.

“ The distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (it affording a commodious asylum for debtors, outlaws, and smugglers) authority was given to the treasury, by statute 12. Geo. 1. c. 28. to purchase the interest of the then proprietors for the use of the crown ; which purchase was at length completed in the year 1765, and confirmed by statutes 5. Geo. 3. c. 26. and 39, whereby the whole island and all its dependencies, so granted as aforesaid, (except the landed property of the Atholl family, their manerial rights and emoluments, and the patronage of bishopricks, and other ecclesiastical benefices) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs.”

— Shame to American legislation ! That in England, a limited monarchy, where there is no written constitution, where the parliament is omnipotent, and can mould the constitution at pleasure, a more sacred regard should have been paid to property, than in America. surrounded as we are with a blaze of political illumination, where the legislatures are limited, where we have republican governments, and written constitutions, by which the protection and enjoyment of property are rendered inviolable.

The case of the Isle of Man was a fair and honourable stipulation; it partook of the spirit and essence of a contract; it was free and mutual; and was treating with the proprietors on equal terms. But if the business cannot be effected in this way, then the value of the land, intended to be taken, should be ascertained by commissioners, or persons mutually elected by the parties, or by the intervention of the judiciary, of which a jury is a component part. In the first case, we approximate nearly to a contract; because the will of the party, whose property is to be affected, is in some degree exercised; he has a choice; his own act co-operates with that of the legislature. In the other case, there is the intervention of a court of law, or, in other words, a jury is to pass between the public and the individual, who, after hearing the proofs and allegations of the parties, will, by their verdict, fix the value of the property, or the sum to be paid for it. The compensation, if not agreed upon by the parties or their agents, must be ascertained by a jury. The interposition of a jury is, in such case, a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility. By the confirming act, the value of the land taken and the value of the land to be paid in recompence, are to be ascertained by the board of property. And who are the persons that constitute this board? Men appointed by one of the parties, by the legisla-

ture only. The person, whose property is to be divested and valued, had no volition, no choice, no co-operation in the appointment; and besides, the other constitutional guard upon property, that of a jury, is removed and done away. The board of property, thus constituted, are authorised to decide upon the value of the land to be taken, and upon the value of the land to be given by way of equivalent, without the participation of the party or the intervention of a jury.

2. The nature of the compensation.

By the act the equivalent is to be in land. No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompence in value, *a quid pro quo*, and must be in money. True it is, that land or any thing else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalise the act, and make it valid; nothing short of it will have the effect. It is obvious, that if a jury pass upon the subject or value of the property, their verdict must be in money.

To close this part of the discourse: It is contended that the legislature must judge of the necessity of interposing their despotic authority; it is a right of necessity upon which no other power in government can decide: that no civil institution is perfect;

and that cases will occur, in which private property must yield to urgent calls of public utility or general danger. Be it so. But then it must be upon complete indemnification to the individual. Agreed. But who shall judge of this indemnification? Did there also exist a state necessity, that the legislature, or persons solely appointed by them, must admeasure the compensation, or value of the lands seized and taken, and the validity of the title thereto? Did a third state necessity exist, that the proprietor must take land by way of equivalent for his land? And did a fourth state necessity exist, that the value of this land-equivalent must be adjusted by the board of property, without the consent of the party, or the interference of a jury? Alas! how necessity begets necessity. They rise upon each other and become endless. The proprietor stands afar off, a solitary and unprotected member of the community, and is stripped of his property, without his consent, without a hearing, without notice, the value of that property judged upon without his participation, or the intervention of a jury, and the equivalent therefor in lands ascertained in the same way. If this be the legislation of a republican government, in which the preservation of property is made sacred by the constitution, I ask, wherein it differs from the mandate of an Asiatic prince. Omnipotence in legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of laws, of

courts, of constitutions, and call ourselves free. In short, gentlemen, the confirming act is void ; it never had constitutional existence ; it is a dead letter, and of no more virtue or avail, than if it never had been made.

II. But admitting the confirming act to be constitutional and valid, the next subject of enquiry is, what is its operation, or, in other words, what construction ought to be put upon it.

It is contended, on the part of the defendant, that on the passing of the act the estate was divested from the Pennsylvania claimants, and instantly vested in the Connecticut settlers. To decide upon this question, it will not be amiss to lay down a rule or two of exposition applicable to the act under consideration.

A statute shall never have an equitable construction in order to overthrow or divest an estate.

Every statute, derogatory to the rights of property, or that takes away the estate of a citizen, ought to be construed strictly.

Let us test this act by the foregoing rules. The act is entitled, “ An act for ascertaining and confirming to certain persons, called Connecticut claimants, the lands by them claimed within the county of Luzerne, and for other purposes therein mentioned,” and was passed the 28th March, 1787.

The first five sections, being material in the discussion of this part of the subject, run in the following words.

“ Sect. 1. Whereas an unhappy dispute for many years subsisted between the province and state of Pennsylvania, on one part, and the colony and state of Connecticut on the other part, relative to certain lands within the charter boundary of Pennsylvania, but which were claimed by Connecticut, as falling within the limits of her charter; which dispute was finally terminated by the decree of the court of commissioners, at Trenton, on the thirtieth day of December, one thousand seven hundred and eighty-two, in the mode prescribed by the articles of confederation of the United States; by which decree, the question between the two states was decided in favour of Pennsylvania: And whereas, before the termination of the said claim of Connecticut, a number of its inhabitants with their associates settled upon and improved divers tracts of land, lying on or near to the north-east branch of the river Susquehanna, and the waters thereof, and now within the county of Luzerne: And whereas, parts of the same lands have been claimed under titles derived from the late proprietaries of Pennsylvania; and these interfering claims have occasioned much contention, expence, and bloodshed; and this assembly being desirous of putting an end to those evils, by confirming such of the Connecticut claims as were acquired by actual settlers prior to the termination of the said dispute, agreeably to the petition of a number of the said settlers, and by granting a just compensation to the Pennsylvania claimants: And whereas the lands aforesaid, claimed by the Connecticut settlers, have been usually assigned

“ to them in rights or lots of about three hundred
 “ acres each ; which rights or lots have either been
 “ entire, or in two or more divisions : Therefore,
 “ Sect. 2. *Be it enacted*, and it is hereby enacted
 “ by the representatives of the freemen of the com-
 “ monwealth of Pennsylvania in general assembly met,
 “ and by the authority of the same, That all the said
 “ rights or lots now laying within the county of Lu-
 “ zerne, which were occupied or acquired by Connec-
 “ ticut claimants, who were actually settlers there at
 “ or before the termination of the claim of the state
 “ of Connecticut, by the decree aforesaid, and which
 “ rights or lots were particularly assigned to the said
 “ settlers prior to the said decree, agreeably to the regu-
 “ lations then in force among them, be, and they are
 “ hereby confirmed to them, and their heirs, and
 “ assigns : Provided, That all the claimants, whose
 “ lots are hereby confirmed, shall by themselves, gaur-
 “ dians, or other lawful agents, within eight months
 “ next after passing this act, prefer to the commission-
 “ ers herein after mentioned, their respective claims
 “ to the lots aforesaid, therein stating the grounds of
 “ their claims, and sufficiently describing the lots
 “ claimed, so that the same may be made known and
 “ ascertained, and support the same by reasonable
 “ proofs.

“ Sect. 3. And whereas it will be necessary to in-
 “ stitute a summary mode of ascertaining and esta-
 “ blishing the right of each claimant ; *Be it further*
 “ *enacted*, by the authority aforesaid, That Peter
 “ Muhlenberg, Timothy Pickering, and Joseph Mont-
 “ gomery, Esquires, be and they are hereby appointed

“ commissioners for the purposes herein after expressed and declared ; and in case of the death, absence, or refusal to serve of any or all of the said commissioners, the supreme executive council are hereby authorized and required to supply the vacancy or vacancies occasioned thereby, by other new appointment or appointments.

“ Sect. 4. *And be it further enacted* by the authority aforesaid, That the said commissioners shall repair to the county of Luzerne, within two months next after the passing of this act, and at such place within the same county, and at such time as they, the said commissioners, shall appoint to meet together, for the purpose of receiving and examining the claims of all persons to the lots intended by this act to be confirmed. And the said commissioners are hereby empowered to adjourn their meeting from time to time ; and to such places within the said county, as they shall judge best for the proper and speedy execution of their commission. And that all persons interested in the said lots, may be duly notified to make and support their claims thereto, within the time prescribed by this act, the said commissioners shall cause it to be published in one or more of the newspapers printed in Pennsylvania and Connecticut, with an advertisement subjoined, expressing the time and place proposed for their first meeting, and copies of this act, and of the said advertisement shall also be posted up at sundry places within the said county, for the information of the inhabitants. And the examination of the said claims shall be by witnesses, on their oaths

“ or affirmations, (which the said commissioners are
 “ severally empowered to administer,) and such other
 “ evidence as shall be produced to the said commis-
 “ sioners, or which they can obtain. And of such
 “ claims as shall be supported by evidence satisfactory
 “ to the said commissioners, or any two of them, there
 “ shall be made a fair entry, in which the lots so claim-
 “ ed shall be described, and in such manner that the
 “ same may be clearly known and ascertained. Pro-
 “ vided, That where two or more claims of Connec-
 “ ticut claimants to the same lot, shall be presented,
 “ and it shall appear to the said commissioners by sa-
 “ tisfactory evidence, that the same lot ought to be
 “ confirmed, agreeably to the meaning of this act, they
 “ shall make a fair entry thereof as aforesaid ; and if
 “ the several claimants agree to submit their claims to
 “ the determination of the said commissioners, they
 “ shall proceed to hear and determine the same accor-
 “ dingly ; but if they do not thus agree, either of the
 “ claimants may prosecute his claim in the proper
 “ court of law, as in ordinary cases of contested titles.

“ Sect. 5. *And be it further enacted*, by the autho-
 “ rity aforesaid, that the said commissioners be, and
 “ they are hereby authorised to appoint a surveyor or
 “ surveyors, to survey all the lots aforesaid of the
 “ Connecticut claimants ; and the surveys thereof
 “ shall be returned to the said commissioners for their
 “ information and assistance in prosecuting their en-
 “ quiries and examinations ; and the surveys of such
 “ of the said lots, the claims to which shall be admit-
 “ ted by the said commissioners, shall by them be af-
 “ terwards returned, together with their book of en-

“ tries describing the same, to the supreme executive
 “ council, who shall cause patents to be issued for their
 “ confirmation, and each patent shall comprehend all the
 “ parcels of land, which are to be confirmed to the same
 “ claimant or joint claimants, to whom, by the return
 “ of the commission aforesaid, the same shall be found
 “ to belong.”

The act requires,

That the Connecticut settlers shall prefer their claims to the commissioners.

That they shall support their claims by reasonable proof. That the commissioners shall adjudicate upon or confirm the claims.

That they shall have the lots, to which claims are set up and admitted, surveyed; that they shall make return of their surveys and their book of entries to the supreme executive council, who shall cause patents to be issued for their confirmation, and each patent shall comprehend all the parcels of land, which are to be confirmed to the same claimant, to whom, by the return of the commissioners, the same shall be found to belong.

The mere offering or presenting of the claim is not sufficient. It must be supported by reasonable proof, and ascertained, and established by the commissioners. These acts must be performed before the estate passes out of the Pennsylvania claimants, and is vested in the Connecticut settlers. They are antecedent acts, and in nature of a condition precedent. Now conditions precedent are such as must happen or be performed before the estate can vest or be enlarged; they admit of no latitude; they must

Co. Lit. 206,
218. 1 Atk.
374, 376.
Com. Rep.
732.

be strictly, literally, and punctually performed. It is a known maxim, that where the estate is to arise upon a condition precedent, it cannot vest till that condition is performed : and this has been so strongly adhered to, that even where the condition has become impossible, no estate or interest grew thereupon. Where a condition copulative precedes an estate, the whole must be performed before the estate can arise ; or where an act is previous to any estate, and that act consists of several particulars, every particular must be performed before the estate can vest or take effect.

The estate of the Pennsylvania claimants was not divested on the passing of the act ; it was not divested on presenting the claim on the part of the Connecticut settlers. Other acts were previously necessary, and in particular the commissioners must pass upon and confirm the claim before the estate is divested from the one party and vested in the other. These things precede, and must be done before any estate can vest in the defendant ; but they have not been, and therefore the estate remains in the plaintiff. This construction corresponds with the meaning and spirit, the tendency and scope of the act itself. The intention of the legislature was to vest in Connecticut claimants of a particular description a perfect estate to certain lands in the county of Luzerne ; but then it was upon condition ; it was to operate upon, secure, and sanctify such claims only as should be admitted and ascertained, approved and established by the commissioners. This is further evident from the powers and functions of the commissioners, who were to enquire, examine, hear

proofs, &c. respecting the claims; and for what purpose? why, that they might admit and approve of such as were supported by satisfactory evidence, and make return thereof to the executive council, who should thereupon cause patents to be issued for their confirmation. Until the commissioners had decided in favor of a claim, it remained *in statu quo*; the act did not cover and protect it. Further, if the act will admit of two constructions, that one certainly ought to be adopted, which is in favor of the legal owner, and which will not divest his estate, till the terms specified in the act shall have been fully complied with. When the legislature undertake to give away what is not their own, when they attempt to take the property of one man, which he fairly acquired, and the general law of the land protects, in order to transfer it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined with critical exactness, and scrutinized with all the severity of legal exposition. An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of property.

Besides, it was the manifest intention of the makers of the act, that a just compensation should be made in land to the Pennsylvania claimants; upon this principle the act proceeds; and therefore if it appear, that such compensation cannot be made, or that it is very dubious, whether it can be effected; the court ought not to give such a construction, as will deprive the owner of his estate, with little or no prospect of being recompensed in value. If either party ought to be

driven to the necessity of controverting the question with the state of Pennsylvania, it ought to be the Connecticut settlers, who have no legal title to the land, and not the Pennsylvania claimants, in whom is vested a good estate at law.

Deeming the construction, which has been put upon the act, to be the sound one, it precludes the enquiry, how far a patent of confirmation was necessary to substantiate the claim of the defendant, so as to render it available in a court of common law.

III. The nature and operation of the suspending act.

This act was passed the 29th of March, 1788, and is as follows.

“ Sect. 1. Whereas by an act, entitled, “ An act
 “ for ascertaining and confirming to certain persons,
 “ called Connecticut claimants, the lands by them
 “ claimed within the county of Luzerne, and for other
 “ purposes therein mentioned,” it is among other
 “ things “ enacted, that certain commissioners therein
 “ named, or thereafter to be appointed, should, with-
 “ in a limited time, meet together within the said
 “ county, for the purpose of receiving and examining
 “ the claims of the said claimants, and ascertaining
 “ and confirming the same. And whereas when these
 “ commissioners had met in pursuance of the said law,
 “ they were interrupted in their proceedings by the
 “ combinations, threatenings, and outrageous violence
 “ of certain lawless people in the said county of Lu-
 “ zerne, and obliged to fly for the preservation of their

“ lives. And whereas doubts have also arisen concern-
 “ ing the construction, true intent, and meaning of
 “ said law, for which and other causes it hath become
 “ very difficult to determine the same, and to adjust
 “ the compensation to be made to those persons, who
 “ will be divested of their property by the operation
 “ of the said law, if the same should be carried into
 “ effect. And whereas the time, in which these com-
 “ missioners were to receive claims, has expired, but
 “ their other powers still remain, which, if immediate-
 “ ly executed, without further provisions and regula-
 “ tions being previously made, will tend to embarrass-
 “ ment and confusion.

“ Sect. 2. *Be it therefore enacted*, and it is hereby
 “ enacted by the representatives of the freemen of the
 “ commonwealth of Pennsylvania in General Assem-
 “ bly met, and by the authority of the same, that so
 “ much of the said law as empowers the said commis-
 “ sioners to ascertain and confirm the claims of the
 “ said people called Connecticut claimants, and all and
 “ every part of said act, which gives any power and
 “ authority to the said commissioners, be and the same
 “ is hereby suspended, until the legislature of this com-
 “ monwealth shall, by a law for that purpose to be
 “ enacted, make further provisions and regulations
 “ in the premises, and shall direct and require the
 “ said commissioners to proceed in the exercise of their
 “ said powers.”

This act was passed before the adoption of the con-
 stitution of the United States, and therefore is not af-
 fected by it. If the legislature had authority to make
 the confirming act, they had also authority to suspend

it. Their constitutional power reached to both, or to neither. By the act of the 28th of March 1787, the commissioners were to ascertain and confirm the claims of the Connecticut settlers, upon the doing whereof the estate, if the law was constitutional, would become vested in them. This has not been done; the claim in the present instance has not been ascertained and confirmed; and as this act suspends or revokes these ascertaining and confirming powers, it never can be done. Of course there is an end of the business. The parties are placed on their original ground; they are restored to their pristine situation.

IV. After the opinion delivered on the preceding questions, it is not necessary to determine upon the validity of the repealing law. But it being my intention in this charge to decide upon all the material points in the cause, in order that the whole may at once be carried before the supreme judicature for revision, I shall detain you, gentlemen, a few minutes only, while I just touch upon the constitutionality of the repealing act. This act was passed the 1st of April 1790: the repealing part is as follows.

“ Sect. 1. Whereas an act of assembly, enacted
 “ the 28th day of March 1787, entitled “ An act for
 “ ascertaining and confirming to certain persons, cal-
 “ led Connecticut claimants, the lands by them claim-
 “ ed within the county of Luzerne, and for other pur-
 “ poses therein mentioned, hath been found in its
 “ principles and operations to be unjust and oppres-
 “ sive, in as much as it divested many citizens of this
 “ state of their lands without their consent, and with-

E R R A T A.

In page 5, line five from bottom, for consolitary, *read* consolatory.

——— 8, line eleven from bottom, for operation.
read operation ?

——— 10, end of second paragraph, for act. *read* act?

——— 12, line second from top, for governmental,
read governmental.



“ out making them any just compensation : And
 “ whereas, depriving individuals of their property in
 “ such a summary way is unconstitutional, and of the
 “ most dangerous consequence : And whereas said
 “ act was enacted by the legislature hastily, with-
 “ out due consideration had, and proper informa-
 “ tion of the magnitude of the grant : And where-
 “ as, carrying said act into effect would impose a
 “ grievous burthen on the good citizens of this state,
 “ to make compensation to those, who would thereby
 “ be divested of their property : And whereas the
 “ reasons set forth in the preamble of said act, do not
 “ appear sufficient to warrant any legislative interfer-
 “ ence, or departure from the established rules of
 “ justice in respect to private property, nor had the
 “ effect proposed.

“ Sect. 2. *Be it therefore enacted*, and it is hereby
 “ enacted by the representatives of the freemen of the
 “ commonwealth of Pennsylvania, in General Assem-
 “ bly met, and by the authority of the same, That
 “ the act, entitled, “ An act for ascertaining and
 “ confirming to certain persons, called Connecticut
 “ claimants, the lands by them claimed within the
 “ county of Luzerne, and for other purposes therein
 “ mentioned,” be, and the same is hereby repealed,
 “ and all proceedings had under said act are hereby
 “ rendered void, and declared to be null, and of no
 “ effect, and all titles and claims, which might be suppo-
 “ sed to be affected by said act, are hereby revested in
 “ the former owners, in as full and ample a manner as
 “ if the said act had never been enacted, any thing
 “ in the same to the contrary notwithstanding.”

This act was made after the adoption of the constitution of the United States, and the argument is, that it is contrary to it.

1. Because it is an *ex post facto* law.

2. Because it is a law impairing the obligation of a contract.

1. That it is an *ex post facto* law. But what is the fact? If making a law be a fact within the words of the constitution, then no law, when once made, can ever be repealed. Some of the Connecticut settlers presented their claims to the commissioners, who received and entered them. These are facts. But are they facts of any avail? Did they give any right, or vest any estate? No—whether done or not done, they leave the parties just where they were. They create no interest, affect no title, change no property; when done, they are useless and of no efficacy. Other acts were necessary to be performed, but before the performance of them, the law was suspended and then repealed.

2. It impairs the obligation of a contract, and is therefore void. If the property to the lands in question had been vested in the state of Pennsylvania, then the legislature would have had the liberty and right of disposing or granting them to whom they pleased, at any time, and in any manner. Over public property they have a disposing and controlling power, over private property they have none, except, perhaps, in certain cases, and those under restrictions, and except also what may arise from the enactment and operation of general laws respecting property, which will affect themselves as well as their constituents. But

if the confirming act be a contract between the legislature of Pennsylvania and the Connecticut settlers, it must be regulated by the rules and principles, which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the Pennsylvania claimants, who are third persons, of their just rights; rights ascertained, protected, and secured by the constitution and known laws of the land. The plaintiffs title to the land in question is legally derived from Pennsylvania; how then, on the principles of contract, could Pennsylvania lawfully dispose of it to another? As a contract, it could convey no right, without the owner's consent; without that, it was fraudulent and void.

I shall close the discourse with a brief recapitulation of its leading points.

1. The confirming act is unconstitutional and void. It was invalid from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made. If so, the plaintiffs title remains in full force.

2. If the confirming act is constitutional, the conditions of it have not been performed; and therefore the estate continues in the plaintiff.

3. The confirming act has been suspended—and

4. Repealed.

The result is, that the plaintiff is by law entitled to recover the premises in question, and of course to your verdict.

WILLIAM PATERSON.

